

Dissenting Statement of Committee Members Randy Chapman and Joanne Daley

Please accept this minority report with respect to one aspect of the proposed changes to Rule 7 of the Massachusetts Rules of Criminal Procedure. More specifically we strongly advise against abolishing the provisions in Rule 7 permitting the defendant's waiver of appearance at a summons arraignment.

As you are aware, Rule 7 provides for the waiver of a defendant's appearance from arraignment when he or she has retained counsel, and properly notified the court and Commonwealth prior to the return date for the arraignment. This rule has not created any legitimate problems with the administration of justice since its promulgation. Notwithstanding the rationales for the rule change advanced by the majority, there is simply no compelling reason jettisoning a rule which has been working effectively since its promulgation in 1979.

Several members of the Standing Advisory Committee have spoken to judges, probation officials, clerks, and members of the bar regarding Rule 7. The almost universal opinion is that the existing rule has not posed a problem with the administration of justice. In fact, the rule has many positive benefits. Stated another way, this proposed rule change is seemingly fixing a problem which does not exist.

It should be noted that the vast majority of cases involving Rule 7 are in the District Court Department. Interestingly, the District Court has a Standing Rules Committee. Certainly, if the problems with Rule 7 were as pervasive as suggested by the majority, that committee would have initiated action and proposed a change. The fact that no action has been taken in over thirty years, should give the Court great reluctance to abolish the provisions of Rule 7.

Rather than hinder the administration of justice, the minority respectfully submits that the existing Rule 7 actually enhances it. By reducing the number of people required to appear in court, the rule eliminates unnecessary congestion in court houses, and the associated pressures on court security, and the probation department. The dissent feels that in these difficult fiscal times this proposed rule change could further burden the court's limited resources without creating an appreciable benefit to the administration of justice.

The majority notes that the waiver of appearance provision is seen by some members as giving a give special benefit to "those wealthy enough to afford counsel". However, in circumstances when the defendant relieved the Commonwealth of the financial obligation of funding the defendant's defense, there is no reason to require he or she come to court simply as a matter of equity. Taken a step further, it is appropriate for the Rule to encourage a defendant to privately retain an attorney.

The majority has identified a series of justifications for this dramatic change to the rule. However, these issues occur extremely infrequently in the context of Rule 7 appearance waivers. In the rare occasions when they do occur, the court is always free to continue the arraignment for a future date to bring the defendant before the court, or to simply address the issues during the pre-trial hearing date which typically occurs shortly after the arraignment.

It should be noted that although this remedy currently exists (to continue the arraignment, or set a short date for a pretrial hearing), it is almost never pursued. It is hard to imagine a circumstance where a court felt helpless or frustrated by the mandates of Rule 7, where it determined that a summonsed defendant needed to be physically brought before the court for some unanticipated reason.

When reviewing the various issues raised by the majority, it is important to remember that typically the offense where a summons issued for an arraignment is relatively minor. Furthermore, once the complaint issued a presumably informed and intelligent decision was made by the court, usually with the input of the police, to summons the defendant for arraignment. The rule does not apply to any defendant that had to be arrested. It also does not apply when an arrest warrant was issued. If someone was a risk of flight or a danger to the community they would not have been summonsed in the first place.

One issue of note raised by the majority is that there are circumstances when the court might wish to advise the defendant of the so-called “bail warnings”. However, a careful reading of the bail warning statute limits its applicability to situations where the defendant was before the court following an arrest. In any event, certainly if this is a systematic problem, the Rules Committee can suggest more refined changes to the rule than currently proposed.

While the majority cites a laundry list of situations where the defendant’s appearance might be useful, none warrant a complete repeal of a rule that has worked almost without difficulty for the last practice over the last 3 decades. At a minimum, before the Court takes action it should specifically request the input from the Rules Committees from the Departments directly impacted by this proposed change. That would include the District Court, Boston Municipal Court, Juvenile Court and Superior Court.

Based upon the foregoing the dissent respectfully requests that the proposed change to Rule 7 be rejected.